In the

United States Court of Appeals

For the Ninth Circuit

No. 13245

WESTERN AIR LINES, INC.,
Petitioner,
vs.
CIVIL AERONAUTICS BOARD,
Respondent.

BRIEF OF UNITED AIR LINES, INC., AS AMICUS CURIAE.

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INDEX.

LIST OF AUTHORITIES CITED.

Cases.

Texts and Articles.

Statutes.

MISCELLANEOUS.

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* Not officially reported.

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JURISDICTION.

This proceeding involves a petition filed by Western Air Lines, Inc., for review of a final order of the Civil Aeronautics Board issued on January 17, 1952. Such petition for review was filed pursuant to Section 1006 of the Civil Aeronautics Act of 1938, 49 U. S. C. 401, 646, 52 Stat. 973, 1024, and Section 10 of the Administrative Procedure Act, 5 U. S. C. 1001, 1009, 60 Stat. 237, 243.

Section 1006 of the Civil Aeronautics Act provides, in part, that any order issued by the Civil Aeronautics Board shall be subject to review by the Circuit Courts of Appeals

of the United States, or by the United States Court of Appeals for the District of Columbia, on petition filed within sixty days after the entry of such order by any person disclosing a substantial interest therein. Further, the statute provides that such petition for review shall be filed in the court for the circuit in which the petitioner resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, and provides that upon transmittal of a copy of the petition to the Board, the court in which such filing is made shall have exclusive jurisdiction to affirm, modify or set aside the order complained of, in whole or in part, and, if need be, to order further proceedings by the Board.

Section 10 of the Administrative Procedure Act reaffirms the method and manner of review provided for in the Civil Aeronautics Act.

All jurisdictional requirements have been complied with by Western, and its petition for review is properly before this Court.

STATEMENT OF FACTS.

The petition for review herein arises out of a consolidated proceeding before the Civil Aeronautics Board known as the *Reopened Additional California-Nevada Service Case*. At the time of that proceeding, Western Air Lines, Inc., was, and still is, the holder of various permanent Certificates of Public Convenience and Necessity including a permanent Certificate of Public Convenience and Necessity for route No. 13 which, among other things, authorized that carrier to engage in air transportation between San Diego, El Centro, Yuma, Palm Springs, San Bernardino, Long Beach and Los Angeles. At that time, a so-called local-feeder carrier, Bonanza Air Lines, Inc., held a temporary Certificate for route No. 105, which extended between Phoenix and Reno via certain intermediate points.

The proceeding before the Board involved various matters, including (1) an Order of the Board directing Western to show cause why its permanent Certificate for route No. 13 should not be suspended insofar as it authorized service to El Centro, Yuma, San Bernardino and Palm Springs, (2) an application by Western for the extension of its route No. 13 from Yuma to Phoenix, and (3) an application by Bonanza for the extension of its route No. 105 from Phoenix to San Diego and Los Angeles via certain points including El Centro and Yuma.

By its opinion and order entered on January 17, 1952, Serial No. E-6040, the Board denied Western's above described application but granted the application of Bonanza and extended its route from Phoenix to Los Angeles and Long Beach via Blythe, Ajo, Yuma, El Centro, San Diego,

Oceanside and Santa Ana-Laguna Beach. By that same order, the Board also directed the "suspension" of the authorizations contained in Western's certificate for route No. 13 with respect to the cities of El Centro and Yuma. In effect, the Board has directed the substitution of Bonanza to provide the services to and from El Centro and Yuma previously conducted by Western. The period of "suspension," as stated in the order is up to and including December 13, 1952, or until the date upon which the Board shall have finally determined a timely filed application by Bonanza for renewal of its certificate for route No. 105, whichever shall last occur.

It is the Board's opinion and order of January 17, 1952, which is the subject of review before the Court. The order is challenged as being legally invalid for the reasons hereinafter set forth.

Certain aspects of the Board's above described action, all of which are discussed in greater detail subsequently, pervade this entire proceeding and have a major bearing upon the issues presented. The first of these is that the suspension of Western directed here is part of a much larger program of the Board for the realignment of substantial segments of the domestic air route map. Additionally, there is also the fact that the suspension of Western, although stated for a period, actually is for an indefinite term, if not permanent, and, therefore, tantamount to revocation of Western's permanently certificated authority with respect to El Centro and Yuma. Finally, the Board's action is in fact a substitution of the services of one carrier for those of another. By its "suspension" of Western and concurrent grant to Bonanza of a new route to cities that it has not served, including El Centro and Yuma, the Board proposes to substitute the services of Bonanza for the previously established and permanently certificated authorization of Western as to those cities.

The reason underlying this route realignment program on the part of the Board and its attempt to effect a substitution with respect to Western's service is the lack of economic success of what is commonly known as the Board's "local-feeder service experiment". That experiment, which was undertaken during the past several years, involved the creation of a number of new carriers, generally described as local-feeder carriers, for the purpose of experimenting as to the feasibility of local, short-haul feeder air service at smaller communities. The certificates issued to those carriers were, up to the present at least, for comparatively short periods, usually 3 years. *Rocky Mountain States Air Service,* 6 C. A. B. 695 (1946). The Board itself, in appraising the financial results of the operations of those carriers has said (Order Serial No. E-2680, issued April 4, 1949, p. 3):

> "There is little in the record of feeder air carrier experience to encourage a belief that any of such carriers possess, under presently foreseeable conditions, the inherent characteristics for commercial self-sufficiency. For the twelve-month period ended June 30, 1948, the twelve feeder carriers then in operation experienced total operating expenses which exceeded total commercial revenues by approximately $8,500,000. An additional amount would be required to provide a return on investment. None of the feeder carriers had, as of June 30, 1948, closely approached the status of commercial self-sufficiency."

Notwithstanding this experience, the Board has not terminated its feeder experiment. Instead, it is attempting to suspend the prior authorizations of permanently certificated carriers, such as Western, at a number of points in order to make the traffic and revenues at those points available to the local-feeder operators.

United Air Lines, Inc., requested leave to file this brief as *amicus curiae,* because of its interest as an intervenor in

the proceeding before the Civil Aeronautics Board and because of the importance of the issues here involved to the air transportation industry as a whole. The Board's action here under review exposes every certificated carrier and every city on the air route map to the possibility of involuntary revisions in their service patterns. The decision of this Court upon the extent of the Board's power to impair permanent certificates of public convenience and necessity and to substitute the services of one carrier for those of another, therefore, will be of far reaching significance.

SPECIFICATION OF ERRORS RELIED UPON.

The Petition for Review filed by Western Air Lines, Inc., in this proceeding raises the following issues to be resolved herein:

"1. Did the Board commit legal error in amending Western's certificate of public convenience and necessity for Route No. 13 by imposing a condition purportedly suspending Western's right to serve El Centro, California, and Yuma, Arizona, in the manner and for the period provided?

"2. Did the Board abuse its discretionary power in amending Western's certificate of public convenience and necessity for Route No. 13 by imposing a condition purportedly suspending Western's right to serve El Centro, California and Yuma, Arizona, in the manner and for the period provided?

"3. Did the Board violate the provisions of Section 2, Section 401, and particularly Section 401(h), of the Civil Aeronautics Act of 1938?

"4. Did the Board commit legal error in amending Bonanza's certificate of public convenience and necessity for Route No. 105 by adding Segment No. 2 from Los Angeles to Phoenix by way of the designated intermediate points?

"5. Did the Board abuse its discretionary power in amending Bonanza's certificate of public convenience and necessity for Route No. 105 by adding Segment No. 2 from Los Angeles to Phoenix by way of the designated intermediate points?"

Within the scope of such petition for review, this brief *amicus curiae* is directed specifically to the legal questions as to (1) whether the Board possesses the power to realign the air route map in the area here involved by the action that it has undertaken in this case, (2) whether it can validly direct an indefinite or permanent "suspension" of Western's permanent certificate of public convenience and necessity, and (3) whether the Board has the authority to compel the substitution of the services of Bonanza for the permanently authorized services of Western.

ARGUMENT.

I.

THE BOARD POSSESSES NO POWER TO SUSPEND A CARRIER'S CERTIFICATE FOR THE PURPOSE OF REALIGNING THE ROUTE PATTERN.

The power to forcibly remake the air route map, as the Board proposes here, is beyond the language and intent of the Civil Aeronautics Act. The legislative history of the Act as well as pronouncements by the Board and individual members thereof make it clear that one of the principal objectives of that legislation was to guarantee security of route and to bring about stability in the industry. The instrumentalities through which this was to be accomplished are permanent certificates of public convenience and necessity which form the keystone of civil air transportation. Any attempt to infer the existence of a power, which is not expressly granted by the Act, to compel involuntary revisions in permanently certificated routes in favor of temporarily certificated carriers would undermine the basic structure established under the Civil Aeronautics Act as well as one of its fundamental purposes—stability.

By suspending Western's services and substituting those of Bonanza, the Board is proposing to strengthen Bonanza by requiring Western to turn over to it portions of its routes and revenues. This substitution of the services of a wholly new carrier for the services of an existing carrier is pursuant to a program of the Board's looking toward a broad realignment of substantial segments of the domestic air route pattern. By such action, the Board is seeking to establish a new air pattern to conform with

newly established policies and philosophies with respect to the public convenience and necessity. The Board has freely admitted that it is engaged in such a program of route realignment in its decision in the *Southwest Renewal-United Suspension Case,* Docket No. 3718, *et al.,* decided on January 29, 1952, shortly after the decision in the instant proceeding, and involving a similar involuntary suspension of previously certificated services. The following statement made in that case is most pertinent:

> "We have undertaken a series of investigations looking toward the realignment of the domestic route pattern along more economical lines, of which this proceeding was among the first."

The suspensions of trunkline carriers' services proposed by the Board are not limited to the suspension of Western involved in the instant case. The Board has already instituted more than 15 proceedings involving suspension of points or routes served by various carriers, and other similar proceedings have been instituted upon petition or complaint of feeder carriers competing with trunkline carriers.

If the Board has the power which it claims in this proceeding, no carrier will be secure in its operations, investors will be hesitant to place funds in the industry and private enterprise and initiative will be blunted. It is submitted that the "suspension" of Western's services ordered by the Board in this case is beyond the powers of the Board. Nowhere in the Act does the Board have the power to realign the existing route pattern. Nor is there anything in the Act which would confer such power upon the Board by necessary implication.

1. The Board has only limited statutory authority.

The Board, being an administrative agency created by statute, possesses only those powers conferred upon it expressly or by necessary implication within the four corners of the Civil Aeronautics Act of 1938, as amended. *Arrow-Hart & Hegeman Electric Company* v. *Federal Trade Commission,* 291 U. S. 587, 54 S. Ct. 532 (1934); *Smith Bros. Revocation of Certificate,* 33 M. C. C. 465, 471 (1942). In the absence of a clear grant of authority, the Board is not warranted in assuming a power through its own construction of the Civil Aeronautics Act unless there exists an unmistakable evidence of intent on the part of Congress that it have such power. Moreover, a permanent certificate of public convenience and necessity such as that provided for under the Civil Aeronautics Act constitutes a property right. Similar certificates issued under the Motor Carrier Act and other acts have been held to confer upon the holder thereof such property interests as entitled them to the protection of the Constitution. *Frost* v. *Corporation Commission of Oklahoma,* 278 U. S. 515, 49 S. Ct. 235 (1929); *Rock Island Motor Transit Company* v. *United States,* 90 F. Supp. 516 (1949) (reversed on other grounds 340 U. S. 419, 71 S. Ct. 382). The power to suspend or revoke certificates of public convenience and necessity, being an interference with established property rights, should be strictly construed. 3 Sutherland, *Statutory Construction,* pp. 275-6 (3rd ed., 1943); cf. *United States* v. *Seatrain Lines,* 329 U. S. 424, 67 S. Ct. 435 (1947).

The statutory authority upon which the Board relies to accomplish its objectives of route realignment is contained in Section 401(h) of the Civil Aeronautics Act, which reads as follows:

> "The Board, upon petition or complaint or upon its own initiative, after notice and hearing, may alter,

amend, modify, or suspend any such certificate, in whole or in part, if the public convenience and necessity so require, or may revoke any such certificate, in whole or in part, for intentional failure to comply with any provision of this title or any order, rule, or regulation issued hereunder or any term, condition, or limitation of such certificate: *Provided,* That no such certificate shall be revoked unless the holder thereof fails to comply, within a reasonable time to be fixed by the Board, with an order of the Board commanding obedience to the provision, or to the order (other than an order issued in accordance with this proviso), rule, regulation, term, condition, or limitation found by the Board to have been violated. Any interested person may file with the Board a protest or memorandum in support of or in opposition to the alteration, amendment, modification, suspension, or revocation of a certificate." (49 U. S. C. Sec. 481(h).)

This provision does not confer upon the Board the power to realign the air route pattern. Nor does it confer any power upon the Board to substitute the services of a temporarily certificated carrier for the existing services of a permanently certificated carrier. Nowhere do the words "realign" or "substitute" appear in this provision or in any other section of the Civil Aeronautics Act.

2. Congress did not intend to grant the power which the Board claims.

Examination of the legislative history pertaining to the Civil Aeronautics Act clearly reveals that Congress did not intend to grant the Board power to suspend involuntarily permanent certificates of public convenience and necessity for the purpose of revising on a wholesale scale the existing air route pattern.

In studying the history of the present legislation governing air transportation, the background existing at the

time such legislation was being considered is extremely significant. The power which the Board here claims would violate the very purpose for which the Civil Aeronautics Act was adopted, namely, to establish stability in the air transport industry.

The Civil Aeronautics Act was adopted in June, 1938, after financial losses and chaos had developed in the air transport industry due to the then existing system of competitive bidding for air mail routes and to cut-throat competition. Stability of routes was essential if the industry were to survive the unhealthy situation in which it found itself and if it were to obtain adequate public financing in order to become a progressive and sound industry. In discussing Senate Bill 3845, which became the Civil Aeronautics Act, Senator McCarran, a sponsor of the legislation, said:

> "Mr. President, with the history of this legislation reflecting a long and arduous and zealous study on the part of everyone who has had to do with the subject; with the growing need for progressive legislation; *with demand on the part of industry and on the part of the traveling public for progressive legislation looking first of all to the stabilization of the industry, so that the industry itself may look to financial agents throughout the country to aid the industry*—financial agents who today are questioning whether or not financial aid should be given to the industry, by reason of its uncertainty as an agency—and furthermore in order that the traveling public may know that the Government of the United States is putting forth every effort within its power to see that the greatest measure of safety in the air is brought about, I say that legislation looking to these ends is all essential, and essential at this session of the Congress." (Congressional Record, May 11, 1938, pp. 8764-65; italics supplied.)

The necessity for such stability had likewise previously been pointed out by the Federal Aviation Commission,

which was appointed by President Roosevelt pursuant to the Airmail Act of 1934 to investigate the air transport industry and the aviation industry as a whole. In commenting on the then existing procedures of competitive bidding, the Commission in 1935 reported:

> "* * * To attempt to allocate the right to run lines through a process of competitive bidding is to throw undue emphasis on economy at the expense of quality, and almost to assure on most routes that the winning bidders will be those who establish their operations on the most parsimonious footing. Competitive bidding is a demonstrably successful device for the finding of a contractor to carry on an undertaking for which complete plans and specifications can be furnished and which can be definitely finished and paid for within a reasonably short time. Air transport, as we see it, clearly violates both of these requirements. *The air transport map cannot be redrawn every few years without utterly disastrous effect on the service.* New lines ought to be created on a substantially permanent basis. An airline cannot be casually torn up and transplanted. * * *"
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> "A certificate once granted should have the quality of a non-exclusive franchise to the extent of being made cancellable *only for good cause or with equitable compensation.*" (Federal Aviation Commission Report, Sen. Doc. 15, 74th Congress, First Session, p. 56; italics supplied.)

The House Committee on Interstate Commerce in reporting on the so-called Lea Bill, H. R. 9738, the House counterpart to S. 3845, had the following to say with respect to the need for aviation legislation:

> "The result of this chaotic situation of the air carriers has been to check the faith of the investing public in their financial stability and to prevent the flow of funds into the industry. Col. Edgar S. Gorrell, president of the Air Transport Association, repre-

> senting substantially all of the scheduled American-flag air lines, testified before your Committee during the public hearings on H. R. 9738 that $120,000,000 of private capital has been invested in the present air-transport system and that 50 per cent of this investment has been lost. He further testified that unless legislation is enacted which would give the carriers reasonable assurance of the permanency of their operation and would protect them from cutthroat competition, a number of the air lines would soon be in serious financial trouble." (Report No. 2254, House of Representatives, 75th Congress, Third Session, April 28, 1938, p. 2.)

In view of this picture, Congress determined that the necessary stability would be achieved through the device of certificates of public convenience and necessity which for all intents and purposes would be permanent. The above cited Report of the House Committee further stated (p. 2):

> "H. R. 9738 would prohibit any person from operating as a common carrier by aircraft unless such person holds a certificate of convenience and necessity, and provides that the rates, regulations, and practices of such air carriers shall be subject to regulation. *Thus, if this legislation is enacted, the air carriers will be able to operate on a stable basis, their routes secured by a certificate of public convenience and necessity, which may be revoked only for cause,* and their rates regulated so as to eliminate cutthroat competition among themselves."

Since the adoption of the Civil Aeronautics Act, the Board and its members have frequently recognized the force of this legislative history and the permanency to be attributed to a certificate of public convenience and necessity. Mr. Ryan, a member since its inception and presently Vice Chairman of the Board, stated in April, 1939:

> "Certificates of public convenience and necessity give

a holder permanent right to the operation authorized, subject only to revocation for violation of the Act." (Ryan, *The Civil Aeronautics Act,* 23 Public Utilities Fortnightly, 518, April 27, 1939.)

In his dissent from the Order of the Board in *Chicago and Southern Suspension Investigation,* Docket No. 2834 (Order, Serial No. E-338, dated March 3, 1947), by which the Board instituted a proceeding to determine whether Chicago and Southern's certificate authorizing service to Latin America should be suspended, Member Lee stated:

> "* * * A carrier's certificate is its guarantee of permanency but if after having been granted a certificate of convenience and necessity for a route the carrier must return and again prove convenience and necessity a second time, even before it has had an opportunity to operate the route, then the certificate will cease to be the substantial asset which it is now. Furthermore, the threat which is contained in this order to the New Orleans segment of this route, which is already in operation, is even more disturbing to the security of air carriers." (dissenting op., p. 10.)*

In a recent opinion (May, 1950) involving applications for exemptions from the requirements of obtaining certificates filed by a group of so-called irregular carriers, the Board, after referring to the economic difficulties which seriously threatened the growth and development of the air transportation industry in the period preceding enactment of the Act and the serious impairment of the credit position of the industry, stated:

> "In this setting, the Civil Aeronautics Act of 1938 was passed. *Its legislative history makes quite clear that the primary objectives of the economic regulatory powers vested in the Board were the establishment of security of route as a basis for sound and orderly development* and the elimination of the unrestricted and

* This investigation was terminated by the Board without action. Order, Serial No. E-1342, April 2, 1948.

cut-throat competition which had brought the industry to its unhappy condition." (Opinion of May 25, 1950, Order Serial No. E-4240, p. 3; italics supplied.)

Thus the Congressional intent is clear: The certificate of public convenience and necessity was intended as an instrument for achieving security of route. Congress did not intend the Board to have the authority it now claims and which would destroy the very route stability which Congress intended the Act to provide. A route is anything but secure if the Board may simply suspend or realign it and substitute another carrier for the previously established, permanently authorized operator.

3. The power claimed by the Board would destroy the stability of the air transport industry.

The power to forcibly remake air routes, were it to exist for the purpose of implementing Board policies, would be a very drastic power, to say the least. Any assumption that the Board possesses such authority would mean that it could reshuffle the entire air transportation map because Section 401(h) applies to all air carriers. If the Board can require trunk line carriers to turn over portions of their routes to feeder carriers, it can require United to turn over a portion of its routes to Western, demand that American suspend its service between New York and Washington in favor of Eastern or, as in this case, substitute the services of a new carrier. The Board places no limit upon its power. What is more important, the Board claims the power which would permit it to revise the route pattern as its philosophy of public convenience and necessity changes from time to time. The impact of such a situation upon the air transport industry is obvious. No one could rely with any assurance upon the op-

erating authority currently possessed by any carrier. Prudent investors would be reluctant to risk their funds in such an industry and management could not act with any reliance upon the future. Management would no longer have the same incentive to develop and promote air transportation. The chaos existing prior to the Act would return.

Such results would be in direct contradiction to the fundamental objective of the Civil Aeronautics Act—stability. Vice Chairman Ryan in connection with this matter had occasion to point out:

> "* * * In view of the protection afforded by the certificate, which for almost ten years has been the foundation of the stability of the private investments dedicated to the public service of air transportation, it is not surprising that Congress should impart to a certificate a certain stability by providing that it should be subject to revocation only for statutory cause *and not pursuant to a mere change of mind on the part of the Board.*" (Ryan, *The Revocation of an Airline Certificate of Public Convenience and Necessity,* 15 Journal of Air Law and Commerce 377, at 385 (1948); italics added.)

The fact is that Congress never intended to give the Board the power to forcibly revamp the air routes of the country by suspensions.

The Civil Aeronautics Board, in its mail rate proceedings, has recognized the importance of stability in the air transport industry in order to create an economically sound industry. Although the Board has claimed the legal power to recapture excess mail payments made to carriers, it declined to exercise such power in *Pan American-Grace Airways, Mail Rates,* 3 C. A. B. 550, 565 (1942), because to assert such power under the circumstances—

> "* * * would impede long-range planning and would inject a measure of uncertainty into undertak-

> ings looking toward the expansion and development contemplated by the Civil Aeronautics Act. It would in all likelihood reduce managerial incentive to accomplish increased economies in operation. Management could hardly be expected to exert itself energetically to such purpose with the ever-present fear, however unfounded it might be, that money saved through increased economies would be taken away. It must be granted, too, that such a policy writes a questionmark across the carrier's financial statements which purport to reflect its true financial condition; for such statements, upon which investors may have relied, may subsequently be rendered misleading by a retroactive order of the Board. To the extent that such incidents create uncertainty as to the carrier's financial position they tend to impair its ability to attract capital, and a program of debt financing on terms unfavorable to the carrier would inevitably result."

Similarly, in *Transcontinental and Western Air, Inc.* v. *Civil Aeronautics Board,* 169 F. 2d 893 (1948), affirmed 336 U. S. 601, 69 S. Ct. 756, in which the Court decided that the Board did not possess the legal power to establish mail rates retroactively prior to the date of the institution of a proceeding therefor, the Court said (p. 896):

> "* * * If the Board could redetermine rates for a past period when the carrier has made less than an adequate profit, or no profit at all, it could do so when the carrier has made more than an adequate profit. The statute makes no differentiation. The financial confusion which would follow from the latter conclusion seems obvious. No rate order would be final. No dividend declaration would be secure. No large commitment would be conclusively feasible. No offering of securities would have a firm foundation. *We find no indication that Congress meant to create so great uncertainty. We would not read a statute as yielding such results unless the language was clear and certain.* We think that if Congress had intended to provide for recoupment of past losses, it would necessarily have

spelled out the terms of the proposal and not have left it to a clause which, if interpreted with that effect, would also have so obviously disastrous effects." (Italics supplied.)

The reasoning of the court applies fully to the issues here under discussion. If certificates were subject to involuntarily being transferred from one carrier to another at any time by the Board or were subject to being suspended so that the traffic could be carried by another carrier, the uncertainty and financial confusion which would result is all too apparent. Congress certainly did not intend to create such uncertainty and gave the Board no such power.

4. The power claimed by the Board is unprecedented.

The Board is claiming a power in this proceeding which is unprecedented in Federal transportation law and which exceeds the authority customarily conferred by Congress. The greatest extent to which Congress has gone in permitting the impairment of operating authority issued in connection with other types of transportation is to be found in the provisions of the Motor Carrier Act which provides as follows with respect to the suspension, change and revocation of certificates, permits or licenses:

"* * * Any such certificate, permit, or license may, upon application of the holder thereof, in the discretion of the Commission, be amended or revoked, in whole or in part, or may upon complaint, or on the Commission's own initiative, after notice and hearing, be suspended, changed, or revoked, in whole or in part, for willful failure to comply with any provision of this part, or with any lawful order, rule, or regulation of the Commission promulgated thereunder, or with any term, condition, or limitation of such certificate, permit, or license. * * *" (Sec. 212(a), 49 U. S. C., Sec. 312(a)).

Under this provision impairment of a certificate may be effected only upon application of the holder or for failure to comply with the act, the orders or regulations of the Commission or the terms of the certificate, *i. e.*, for cause. An identical statutory provision was adopted by Congress in Part IV of the Interstate Commerce Act applicable to forwarders (49 U. S. C., Sec. 1010(f)). Congress made no provision for suspension, change or revocation of certificates issued to common carriers subject to Part I of the Interstate Commerce Act (49 U. S. C., Sec. 1(18) *et seq.*), to water carriers subject to Part III (49 U. S. C., Sec. 909 *et seq.*), or to telephone and telegraph companies coming under the Federal Communications Act (47 U. S. C. Sec. 214).*

Such legislative history as exists with respect to Section 401(h) of the Civil Aeronautics Act indicates that Congress did not intend to give the Board any unusual powers in relation to air transportation. Senator Truman, Chairman of the subcommittee of the Senate Interstate Commerce Committee, which considered the pending legislation, testified that the Bill which became the Civil Aeronautics Act did not suggest "any radical departure from tried and tested methods of regulation and administration." (Hearings on S. 2659, 75th Congress, Third Session, April 6-7, 1938, p. 2.) The Motor Carrier Act, adopted in 1935, was

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* Congress has delegated to the Federal Communications Commission powers of involuntary revocation and modification in the public interest with respect to radio licenses (47 U. S. C. Sec. 312(a)). However, Congress did not intend that such licenses be invested with the character of permanency since the duration of such licenses was limited to three-year periods. Moreover, that portion of the Federal Communications Act applicable to radio does not purport to exercise that complete economic control which exists in the case of other forms of transportation. As stated by the Court in *Pulitzer Publishing Co.* v. *F. C. C.*, 94 F. (2d) 249, 251 (C. C. A., D. C., 1937), the term public convenience, interest, or necessity as employed in the Federal Communications Act "should not be given such a broad meaning as is applied to it elsewhere in public utility legislation."

In addition to the statutory provisions cited above, see also: Federal Power Act, 16 U. S. C., Secs. 799, 820; Federal Alcohol Administration Act, 27 U. S. C., Secs. 204(g), 204(e).

in large part the model for the air legislation. Preliminary bills contained provisions with respect to suspension, change and revocation of certificates of public convenience and necessity which were *identical* in language with Section 212(a) of the Motor Carrier Act. (49 U. S. C., Sec. 312(a).) The subsequent changes were primarily in draftsmanship and were made without discussion either in committee or on the floor of Congress. Unexplained, these changes cannot be made the basis for any argument that Congress intended to grant the new and extensive powers which the Board proposes to exercise in this case. "The interpretation of statutes cannot safely be made to rest upon mute intermediate legislative maneuvers." *Trailmobile Company* v. *Whirls,* 331 U. S. 40, 61, 67 S. Ct. 982, 992 (1947).

The power which the Board here claims—to realign the routes of various carriers by substituting a wholly new carrier for an existing carrier—far transcends the ordinary powers conferred by Congress. It is a drastic power which the Board seeks and one which would have severe and lasting consequences upon the entire air transport industry. In view of its customary approach, it must be assumed that if Congress had intended the Board to have complete power to revise the route pattern from time to time, to substitute different carriers for existing services and to require existing carriers to turn over a portion of their routes and revenues to other carriers, Congress would have conferred such powers by the most careful and express language. Any other assumption is contrary to the very purpose of the Civil Aeronautics Act and imputes a lack of intelligence to this country's legislative body.

The history of legislation applicable to other forms of transportation reveals that Congress would have conferred such powers now sought by the Board only by specific and express language. Thus, when Congress, as part of the Transportation Act of 1920, authorized the Interstate Com-

merce Commission to prepare and adopt a plan for the consolidation of the railway properties of the continental United States into a limited number of systems and provided that future consolidations be in accord with such plan (41 Stat. L. 481, 1920), it did so by carefully selected, specific language. In that instance, the Commission was only given authority to control *voluntary* consolidations in compliance with an over-all prescribed plan.* Obviously, if it had been intended that the Civil Aeronautics Board have a substantially greater power under the Civil Aeronautics Act, namely, power to effect route realignments by the involuntary suspension of permanent certificates of public convenience and necessity and by the substitution of the services of one carrier for another, it stands to reason that Congress would have made its intent clear by specific language. Congress granted no such power to the Board.

II.

THE BOARD HAS NO POWER TO EFFECT AN INDEFINITE OR PERMANENT SUSPENSION OF A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY.

Despite the fact that the Board's order in the instant case provides for the suspension of Western for a fixed period, the proposed suspension is not, in fact, temporary, but is at least indefinite if not permanent and is, in effect, a revocation of Western's operating authority. It is a suspension in words only.

As has heretofore been pointed out, the Board's suspension of Western and the substitution of Bonanza in this proceeding and the suspensions of carriers in other proceedings is being accomplished pursuant to a comprehensive Board program. This policy was announced by the

* It should be noted that such plan was to be finally determined by the Commission only after notice and hearing.

Board in its Order of April 4, 1949 (Orders, Serial No. E-2680), referred to *ante,* p. 5, in which the Board said (p. 8):

> "From the information now before the Board we are of the general opinion that feeder service should seldom if ever be competitive. The traffic potential is so limited in most feeder territory that duplicate operations by two or more carriers can seldom if ever be economical. We have reached the conclusion that in general where a feeder carrier's route is duplicated by a trunkline carrier and such route is not necessary to the trunkline carrier's operation, then such route should be served by the feeder carrier alone. * * * Of course, these general objectives cannot be achieved immediately in many cases and may not be possible to fulfill in particular situations, but they represent salutary principles which are of importance in working out the appropriate relationship between our feeder carriers and the other certificated carriers."

This policy has not been announced as temporary or tentative but is co-extensive with the existence of feeder carriers. Obviously, if the policy accomplishes the results desired by the Board, it will be continued as long as feeders are in operation. In short, the suspensions here proposed by the Board contemplate the effectuation of a permanent Board policy. There is nothing "temporary" about the Board's position.

Every indication is present that operations by feeder carriers will be continued indefinitely. Although these carriers have been granted so-called temporary certificates with fixed expiration dates, such certificates are subject to renewal and have been successively extended by the Board in every instance but one. Pioneer Airlines, Inc., for example, which, as Essair, Inc., was issued a three-year certificate in November, 1943 (*Continental Airlines, Inc., et al., Texas Air Service,* 4 C. A. B. 478), has by suc-

based upon public convenience and necessity and the other upon misuse or violations of the Act. If it were intended by Congress that the cancellation or termination of a certificate could be accomplished based on a finding of the public convenience and necessity, it would have been easy and logical for the framers of the Act to include the word "revoke", which so concisely expresses such power, with the words "alter", "amend", "modify", or "suspend". This was done by Congress in Section 402(g) of the Act. In that section, Congress has provided for the cancellation or revocation of foreign air carrier permits upon the basis of the "public interest", which is also the prescribed standard for the alteration, modification, amendment or suspension of such permits. By providing that

> "Any permit issued under the provisions of this section may, after notice and hearing, be altered, modified, amended, suspended, cancelled, or revoked by the Board whenever it finds such action to be in the public interest. * * *" (49 U. S. C. Sec. 482(g).),

it is clear that Congress did not attribute the same meaning to all of these words. The omission of similar language in Section 401(h) manifests a clear denial of the authority to revoke a permanent certificate upon the basis of public convenience and necessity. To hold that "suspension" and "revocation" in Section 401(h) have identical meaning and effect would ascribe a redundancy to the writers of this legislation which defies all reason. It is a well known principle of statutory construction that every portion of the Act should be read as to ascribe full meaning to it.

> "A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant, and so that one section will not destroy another unless the provision is the result of obvious mistake or error."

(2 Sutherland, *Statutory Construction,* Sec. 4705 (3rd Ed., 1943).)

There can be no question but that a permanent "suspension" constitutes an involuntary termination of authority which the Board cannot here bring about under Section 401 (h) of the Act. Neither non-user or any violations of the Act exist in this case. That an indefinite suspension also has the same effect as revocation was clearly recognized by Member Lee of the Board who, after pointing out in his opinion in *Chicago and Southern Suspension Investigation, supra,* that the Board there was confronted with two alternatives, temporary suspension and "continued" suspension, said in respect of the latter (dissenting op., p. 14):

> "The other alternative would be for the Board to suspend the routes indefinitely, *which means abandonment.* This, of course, raises the legal question as to what rights a certificate gives to a carrier and as to what powers the Board may have to force abandonment of a route through its power of suspension. The Act gives the Board power to revoke a certificate only for failure by a carrier to comply with the provisions of the Act or with the regulations established thereunder, and even then the Board must notify the carrier of its short-comings and request compliance. There would be a legal question as to how long the Board could suspend a certificate unless the carrier agreed to the suspension. The legal question is presented as to whether the Board could effect what would amount to revocation of a certificate through its power to suspend. I do not propose to go into this question now; however, it is presented in this case as an alternative which may face the Board as a result of the investigation, and I merely suggest that if the Board does not have the power to continue the suspension of a certificate indefinitely it may find itself in an embarrassing position if it should decide that the economic conditions require suspension of the cer-

> tificate, and if those conditions continued indefinitely, in the judgment of the Board, and the carrier should insist that it wished to inaugurate service on its route." (Italics supplied.)

Likewise, Vice-Chairman Ryan referring to the same proceeding stated:

> "Any suspension which the Board might order as a result of such investigation must, in my view of the law, be not as a device for accomplishing the permanent cancellation of the service but as a means of accomplishing a temporary postponement of the operation until favorable economic conditions offer lower costs and higher load factors." (Order Serial No. E-337, dated March 3, 1947.)

That Western's suspension in the instant case is at least indefinite is plainly indicated by the language of the new certificate of public convenience and necessity issued to it as a result of the Board's order which is before this Court for review. This certificate now provides that:

> "(3) The holder's authority to serve El Centro, Calif., and Yuma, Ariz., shall be suspended up to and including December 31, 1952, or until the date upon which the Board shall have finally determined a timely filed application by Bonanza Airlines, Inc., for renewal of Segment No. 2 of route No. 105, whichever shall last occur: * * *."

What plainer statement could there be of the Board's intention: In so many words the Board has stated that the duration of Western's suspension shall be contingent upon the further renewal of Bonanza. If the Board had any intention of terminating Western's "suspension" on December 31, 1952, or shortly thereafter, there would be no need to make the termination of such suspension depend upon the date of the Board's decision involving Bonanza's further renewal. Obviously, the Board must contemplate that if Bonanza's authority is extended for a further period, Western's authority to serve El

Centro and Yuma will likewise be further "suspended." Otherwise needless duplication of service at El Centro and Yuma would again result. Successive renewals of Bonanza will call for successive "suspensions" of Western. Such action is not a temporary postponement or deferral of service which would constitute a suspension of service within the meaning of Section 401(h) of the Act, but is an indefinite termination of service equivalent to a revocation and is beyond the powers of the Board. An explanation of the language inserted in Western's certificate was stated by the Board in its opinion as follows (p. 15):

> "We have decided that the suspension of Western's authority to serve El Centro and Yuma should terminate with the expiration of the local service segment awarded herein to Bonanza, *i. e.*, on December 31, 1952, when Bonanza's certificate formally expires. However, it is possible that Bonanza's authorization may be temporarily extended by virtue of Section 9(b) of the Administrative Procedure Act and the filing of a timely application by Bonanza for renewal of its authority. If Bonanza's authority were thus extended it would be appropriate to continue the suspension of Western's authority until disposition of Bonanza's application. Otherwise there would result a needless duplication of service at El Centro and Yuma. * * *"

This explanation does not deny the contemplated indefiniteness of Western's suspension but confirms it.*

The Board cannot do indirectly what it has no power to do directly. The Board cannot by means of a claimed power of suspension effect a revocation of a certificate of public convenience and necessity. In *United States* v. *Seatrain Lines, supra,* the Interstate Commerce Com-

* By its Order Serial No. E-6041, dated January 17, 1952, the Board instituted an investigation to determine whether the routes of Bonanza as extended should be consolidated or otherwise integrated with those of Southwest Airways Company, another feeder carrier. Such action clearly indicates that the Board has no intention to terminate on December 31, 1952, or shortly thereafter, the feeder services to Yuma and El Centro which it has authorized Bonanza to perform.

mission contended that while the Interstate Commerce Act did not specifically empower it to revoke certificates of water carriers, the Commission could nonetheless accomplish the same result under its statutory authority to fix "terms, conditions and limitations" upon certificates. The Supreme Court, after noting that the purpose of the proceeding apparently was to execute a new policy of the Commission, rejected the foregoing argument and held (pp. 432-433):

> "* * * The certificate, when finally granted, and the time fixed for rehearing it has passed, is not subject to revocation in whole or in part except as specifically authorized by Congress. Consequently, the Commission was without authority to revoke Seatrain's certificate. * * *"

The reasoning of that decision is applicable here. The Board's authority to effect revocations is set forth in the Act and it cannot force a revocation except upon the conditions prescribed. Those conditions, as shown, do not exist and any attempt to do indirectly what cannot be done directly is beyond the Congressional delegation of power to the Board.

The Board has contended in the *Caribbean Area Case*, 9 C. A. B. 534 (1948),* that it has the power to eliminate points from a certificate or to impose a restriction prohibiting service previously authorized by virtue of the policy section of the Civil Aeronautics Act, which includes in the definition of public convenience and necessity and public interest the "encouragement and development of an air transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense." It is submitted that such position is untenable.

* In this case, the Board amended the terms, conditions and limitations of the certificate held by Pan American Airways, Inc., to restrict the operation of local flights by that carrier between St. Thomas, V. I., and San Juan, P. R. It did not eliminate service to those points.

The policy of Congress must be determined by the Act as a whole and in light of the intention of Congress expressed in the legislative history and not by Section 2 alone, or any part thereof.

Moreover, it must be assumed that Congress intended the policy expressed in Section 2 to be carried out within the framework of the powers expressly granted to the Civil Aeronautics Board. As shown above, Congress did not grant to the Board power to realign the air route pattern, to modify the system with each change in policy which might result from changing membership on the Board, to substitute the services of one carrier for those of another or to indefinitely suspend a carrier's certificate based upon public convenience and necessity. The policy section of the Act does not enlarge or confer powers not otherwise provided for in the Act. *Yazoo & M. V. R. Co.* v. *Thomas,* 132 U. S. 174, 10 S. Ct. 68, 73 (1889); *In re American States Public Service Company,* 12 F. Supp. 667, 681 (D. C. Md., 1935). This is particularly true where, as here, Section 2 is no more than a definition of the factors to be considered in interpreting the terms public convenience and necessity and public interest used elsewhere in the Act.

Even assuming Section 2 represents the general policy to be followed by the Board in the administration of the Civil Aeronautics Act, the encouragement and development of air transportation is not the sole factor which Congress has said should guide the Board. The Board is also enjoined to regulate air transportation in such manner as to foster sound economic conditions in such transportation. It is obvious that stability of operating authority is essential to this end as well as to the proper encouragement and development of air transportation. The legal power to destroy such stability would be contrary to the very policy established by Congress.

III.

THE BOARD HAS NO POWER UNDER THE ACT TO SUSPEND THE SERVICES OF A PERMANENTLY CERTIFICATED CARRIER AND SUBSTITUTE THOSE OF ANOTHER.

Such power as the Board may have to suspend a carrier's operating authority under Section 401(h) of the Act must be predicated upon the finding that the public convenience and necessity no longer require the air service being provided. Similarly, any extension of service must likewise be based upon the finding of public convenience and necessity for such service. United submits that the Board cannot, without abusing its administrative powers, find that the public convenience and necessity do not require air service and at the same time justify the continuation or substitution of another carrier's service on the basis of that self-same public convenience and necessity. No rule of construction permits the employment of any such legal gymnastics productive of diametrically opposite results in the application of the same provisions of a key statute.

In the instant case, the Board has extended Bonanza from Phoenix to Los Angeles via San Diego and various other intermediate points, including Yuma and El Centro, on the finding that public convenience and necessity require such air service. With respect to the traffic needs of Yuma and El Centro, the Board found (op., p. 3):

> "There is no question that for the cities east of San Diego, such as El Centro, Yuma, Ajo and Blythe, Los Angeles is the western point of greatest traffic attraction."

This is essentially the air service which was being provided for El Centro and Yuma by Western. The Examiner found, and his findings were adopted by the Board, that

during the period February through September, 1950, 83 percent of the traffic to and from El Centro travelled to or from San Diego, Los Angeles and San Francisco, points served by Western; and 90 percent of Yuma's traffic were to and from these points. In view of the above findings, the Board could not and did not find that the public convenience and necessity do not require air service between Yuma and El Centro, on the one hand, and San Diego and Los Angeles, on the other, as provided by Western so as to require Western's suspension. Although the Board found that Western could provide service to Phoenix at less cost to the government and could offer more through service to the communities on the route than any of the other applicants, it concluded that it should nevertheless adhere to its policy of "favoring the award of local service routes to local service operators." The Board also found that the traffic volumes on the proposed route would not support the services of two carriers serving such points as Yuma and El Centro and, accordingly, "suspended" Western's operations to Yuma and El Centro, substituting therefor the operations of Bonanza. The Board's power to suspend does not exist for such purposes. The power of suspension under Section 401(h) is not a device by which the Board can eliminate a permanently certificated carrier as long as the public convenience and necessity require air transportation between the points served by that carrier.

Nor can the Board rely on any contention in this proceeding that excessive competition exists insofar as service to Yuma and El Centro is concerned and that the public convenience and necessity do not require the services of two carriers. The competition which is claimed to be excessive has been created in this very proceeding. To create competition and then in the same opinion to hold that such competition is excessive and requires the suspension of the

existing carrier's services goes far beyond the authority delegated by Congress to the Civil Aeronautics Board.

The Board's suspension of Western is allegedly designed to effect an improvement in the economic position of Bonanza, a feeder carrier. However, the Civil Aeronautics Act does not expressly, or by implication, confer upon the Board the power to substitute the services of one carrier for another or to require one carrier to give up its revenues to a carrier in a less fortunate financial position. Under the Act, the Board is authorized to issue two types of certificates, one carrying a title of temporary and the other not carrying such designation. The latter type of certificate, while not being specifically designated as permanent, was intended to be so by Congress and has been acted upon as such by Congress, the public and the carriers. Presumably, such differentiation in the types of certificates to be authorized by the Board was intended to enable it to terminate the authorizations of carriers having such temporary certificates if required in the public interest. The Board has issued certificates of the temporary type to the feeder carriers and the services of these carriers may be properly terminated under the terms of such certificates if the feeder experiment has resulted in uneconomic operations. The Board has other alternatives available to it but they do not include the power to terminate the operations of permanently certificated carriers in favor of such feeder carriers. To the extent that the Board's feeder experiment requires financial support and to the extent that such operations are required by the public convenience and necessity, the Board has it in its power to provide such support through mail compensation under Section 406 of the Civil Aeronautics Act, which is the remedy which it should pursue instead of depriving other carriers of their revenues.

The standard of public convenience and necessity ap-

plicable to the Board's suspension power in Section 401(h) of the Act indicates the purpose and limits of such power. The power to suspend is given full purpose and meaning if it is interpreted to confer upon the Board the means of relieving an air carrier from serving points or routes where traffic volumes may have declined to such a point as to no longer justify air service but where future developments may again require the resumption of air service.* The common and ordinary meaning of the word suspend which is to withdraw *temporarily* or to stop *temporarily* (page 24, *supra*) carries with it an "expectation" of resumption of service by the carrier which has been suspended when such service is again required. As stated by Member Ryan, the power of suspension under Section 401(h) is not "a device for accomplishing the permanent cancellation of the certificate but only a means of accomplishing *the temporary postponement* of the *operation until favorable economic conditions should offer lower costs and higher load factors.*" (Ryan, *The Revocation of an Airline Certificate of Public Convenience and Necessity, supra;* italics supplied.) The reasonable interpretation to be accorded to the Board's power to suspend under Section 401(h) does not embrace the power of terminating air service by one carrier and substituting the services of another carrier therefor. Authority to make substitutions is nowhere granted in the Civil Aeronautics Act. Had Congress intended to provide such authority it could and would have said so expressly.

The Board's Order of January 17, 1952 is void because it goes beyond the powers conferred upon the Board by the Civil Aeronautics Act of 1938, as amended. The Board has neither expressly nor by implication the authority to suspend Western's permanent certificate of public convenience and necessity for the purpose of realigning the

* Section 401(k) provides for complete termination of service for such reasons upon petition by the carrier for abandonment.

domestic air transportation pattern. It does not have the power to indefinitely or permanently "suspend" Western's permanent certificate of public convenience and necessity, and it does not have the power to substitute the services of a temporarily certificated carrier for those of a permanently certificated carrier. The Board's Order of January 17, 1952 should, therefore, be set aside.

Respectfully submitted,

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Dated: March 10, 1952.

CERTIFICATE OF SERVICE.

I hereby certify that I have this day served the foregoing Brief upon Petitioner, Western Air Lines, Inc., and upon Respondent, Civil Aeronautics Board, by mailing to their respective attorney of record a copy thereof, properly addressed, with postage prepaid.

Dated at Chicago, Illinois, this 10th day of March, 1952.

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